IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 6, 2006 Session

LARRY D. PITTENGER, ET AL. v. RUBY TUESDAY, INC.

Appeal from the Circuit Court for Davidson County
No. 03C-3645 Walter Kurtz, Judge

No. M2006-00266-COA-R3-CV - Filed on March 28, 2007

Restaurant patron and wife filed negligence and negligence *per se* action against restaurant for injuries patron received to his ankle while attempting to open restaurant door for wife. Restaurant filed motion for summary judgment, which trial court granted dismissing all of Plaintiffs' claims. Plaintiffs appealed. We affirm the decision of the trial court, finding that (1) Plaintiffs failed to show that restaurant breached any duty to patron; and (2) Plaintiffs failed to establish that the building code imposed an obligation on Defendant.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Steven E. Sager, Nashville, Tennessee, for the appellants, Larry D. Pittenger and Lucy Pittenger.

Paul M. Buchanan, Julie B. Peak, Nashville, Tennessee, for the appellee, Ruby Tuesday, Inc.

OPINION

On January 4, 2003, Mr. Larry Pittenger visited the Ruby Tuesday restaurant at the Hickory Hollow Mall in Antioch, Tennessee. The entrance to the restaurant rested upon a two inch platform covered with black and white tile, the edge of which was gently sloped. As Mr. Pittenger entered the restaurant, he attempted to turn around and open the door for his wife, while holding his thirty-five pound daughter. At this time, his left foot was allegedly inside the restaurant while his right foot was allegedly outside the restaurant with a one to two inch brass threshold between his feet. When he reached around to push the door back open, Mr. Pittenger claimed that his right ankle rolled over the edge of the tiled platform resulting in an injury to his ankle. Mr. Pittenger claims that at the time of the incident, he did not notice the gently sloping platform.

On December 29, 2003, Mr. and Mrs. Pittenger filed an action against Ruby Tuesday under the theories of negligence and negligence *per se* due to alleged violations of the applicable building

code. On November 10, 2005, Ruby Tuesday filed a motion for summary judgment arguing that it did not breach any duty to Mr. Pittenger, Mr. Pittenger failed to establish cause in fact, Mr. Pittenger was more than fifty percent at fault, and Ruby Tuesday did not have actual or constructive notice of the alleged defect or dangerous condition. On January 19, 2006, the trial court granted Defendant's motion finding that Mr. Pittenger's injury was not foreseeable, the doctrine of negligence *per se* was inapplicable because the building code imposed a duty on the builder of the premises not the occupant, and the threshold was open and obvious and thus Mr. Pittenger was at least fifty percent at fault. Plaintiffs appeal.

Summary judgment is appropriate only where the undisputed facts and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Auto Ins. Co.*, 49 S.W.3d 265, 269 (Tenn.2001). "To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense." *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn.2000). If the moving party satisfies the requirements of Tennessee Rule of Civil Procedure 56, the non-moving party bears the burden of demonstrating how these requirements have not been met either "(1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery." *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn.Ct.App.2001).

When reviewing a motion for summary judgment, courts must consider the evidence in the light most favorable to the non-moving party and must resolve all reasonable inferences in the non-moving party's favor. *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn.2001). The standard of review for a grant of summary judgment is *de novo* upon the record with no presumption that the trial court's conclusions were correct. *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn.2000).

Plaintiffs first claim that the trial court erred in dismissing their negligence action. A claim for negligence requires that the plaintiff prove the following elements: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause." *Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn.1997). The Tennessee Supreme Court has explained that "[t]he duty element is a question of law requiring the court to determine 'whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.'" *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn.1998) (quoting W. Page Keeton, *Prosser & Keeton on Torts,* § 37 at 236 (5th ed.1984)). "In a premises liability case, an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees in the premises. The duty includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence." *Rice*, 979 S.W.2d at 308.

In this case we believe that even if the entrance to Defendant's restaurant was sloping, Plaintiffs failed to offer any evidence that Defendant breached the duty of reasonable care. It is clear from Mr. Pittenger's deposition that he did not know what caused the injury to his ankle. Instead, he assumed that the weight of the entrance door and possibly the tiled platform on which the entrance rested caused his ankle to roll, even though Mr. Pittenger admitted that at the time of the incident he did not notice anything unusual about the entrance. Mr. Pittenger testified:

Q. Well, let me break it down so you understand what I'm asking. Before you tried to open the door, both your foot – one foot was on the solid black entryway tile and one foot was across the threshold on the multicolored tile which is inside the door; is that right?

...

A. Yeah. Yeah.

Q. Okay. And then you tried to hold the door. Did your left foot remain inside the building?

A. I believe it did.

Q. Okay.

A. I'm not 100 percent certain of everything that happened right there, but I believe I still had one foot in and one foot out of the threshold.

...

Q. Okay. And what you're telling me is you made a step with your right foot to open the door – or hold the door open for your wife; is that right?

A. I can remember the door shutting and pushing it back open.

...

A. Reaching out, you know, to push it back open. That's what I remember.

Q. Okay. But what you're telling me is you must have moved your right foot so that part of it was hanging over the two-inch step up between the concrete and the black tile so that your foot would have hold; is that right?

A. My foot had to get there somehow.

Q. Okay. And so you would have taken a step backwards, and you would have stepped onto the edge there between the black tile and the concrete, which would have caused your foot to roll one way or another; is that right?

A. Well, if I would have stepped backwards, I would not be in the other doorway, though, if you step backwards.

Q. Well, let me ask it this way. Did –

A. I don't remember about the steps and stepping and which foot I stepped which way.

Q. All right. Well, let me ask it this way. Your foot rolled. Did it roll because part of your foot was on the black tile and part was on the edge where there's a two-inch step up?

A. I don't think so. I think I was just close to the edge and it rolled. Also, if you look at the picture there's a little bit of a radius here, and that might have had something to play with it too. Did you see that?

...

A. I mean, I don't think my foot was half on or half off. I think just my foot was on top of it and it was just me reaching out – I don't know. Maybe the curvature at the edge, too, had something to do with it.

...

Q. Okay. And so if your foot was fully on the black tile, what caused your ankle to roll?

A. My weight shifting to push the door open. And probably this – the way this step is made added to it, you know.

Negligence is not to be presumed from the mere happening of an accident. *Brackman v. Adrian*, 472 S.W.2d 735, 739 (Tenn.Ct.App.1971); *Friedenstab v. Short*, 174 S.W.3d 217, 219 (Tenn.Ct.App.2004). Negligence shall not be presumed absent an affirmative demonstration from the evidence. *Wiedel v. Remmel*, 328 N.E.2d 391, 393 (Ohio 1975). Therefore, in the context of injuries to plaintiffs resulting from a fall, "mere speculation about the cause of an injury is insufficient to establish liability on a negligence claim." *Cohen v. Meridia Health Sys.*, No. 87001, 2006 WL 1935068, at *2 (Ohio Ct. App. Jul. 13, 2006). "As such, a plaintiff will be prevented from establishing negligence when he, either personally or with the use of outside witnesses, is unable to identify what caused the fall. In other words, a plaintiff must know what caused him to slip and fall. A plaintiff cannot speculate as to what caused the fall." *Beck v. Camden Place at Tuttle Crossing*, No. 02AP-1370, 2004 WL 1277044, at *2 (Ohio Ct.App. Jun. 10, 2004) (internal citations omitted); *see also Sparks v. Knoxville Util. Bd.*, No. 03A01-9803-CV-00092, 1998 WL 668719, at *1 (Tenn.Ct.App. Sept. 30, 1998) ("In a premises liability case such as this one, the plaintiff must prove, among other things, that he or she was injured by a dangerous or defective condition on the defendant's property").

In this case, Mr. Pittenger assumed that a combination of the weight of the entrance door and the slope of the tiled platform caused his ankle to roll as he turned to open the door for his wife; however, such an assumption is nothing more than speculation. Mr. Pittenger cannot state with definiteness what caused his injury and we cannot presume negligence absent an affirmative demonstration from the evidence. Plaintiffs would have us infer that Defendant was negligent merely because Mr. Pittenger was injured on its premises. However, as the Supreme Court of Ohio succinctly explained, "in order for an inference to arise as to negligence of a party, there must be direct proof of a fact from which the inference can reasonably be drawn. A probative inference for

submission to a jury can never arise from guess, speculation or wishful thinking. The mere happening of an accident gives rise to no presumption of negligence." *Parras v. Std. Oil Co.*, 116 N.E.2d 300, 303 (Ohio 1953). Accordingly, we find no error in the trial court's dismissal of Plaintiffs' negligence claim.

Plaintiffs also claim that the trial court erred in finding that the building code did not impose an obligation on Defendant and thus the doctrine of negligence *per se* was inapplicable.

> In order to recover under the theory of negligence per se, a party must establish three elements. First, the defendant must have violated a statute or ordinance that imposes a duty or prohibition for the benefit of a person or the public. *Memphis Street Railway Co. v. Haynes,* 112 Tenn. 712, 81 S.W. 374 (1904). Second, the injured party must be within the class of persons intended to benefit from or be protected by the statute. *Traylor v. Coburn,* 597 S.W.2d 319 (Tenn.App.1980). Finally, the injured party must show that the negligence was the proximate cause of the injury. *Long v. Brookside Manor,* 885 S.W.2d 70 (Tenn.App.1994).

Harden v. Danek Med., Inc., 985 S.W.2d 449, 452 (Tenn.Ct.App.1998).

Plaintiffs argue that Defendant is liable under the doctrine of negligence *per se* because Defendant occupied the building since its construction and according to their expert witness, Mr. Leonard Celauro, the entrance to the restaurant violated the building code in effect at the time the establishment was built. In making their argument, Plaintiffs contend that the building code applies to whomever has control of the premises, regardless of whether the occupant constructed or owned the building. Defendants conversely assert that there is no authority which states that lessees or occupants of a commercial building are legally responsible for the restrictions contained in the building code.

Tennessee courts have applied the doctrine of negligence *per se* in limited situations involving violations of the building code. In *Smith v. Owen*, 841 S.W.2d 828, 833 (Tenn.Ct.App.1992), the court found a landlord negligent *per se* because the building code expressly prohibited the renting of a dwelling for living purposes without a prior inspection in order to assure that the premises met certain standards. The proof showed that the landlord rented the premises without obtaining such an inspection and that an inspection would have likely revealed the defect that caused plaintiff's injury. *Smith*, 841 S.W.2d at 833.

In *Kingsul Theatres, Inc. v. Quillen*, 196 S.W.2d 316 (Tenn.Ct.App.1946), the court found a movie theater operator negligent *per se* for injuries patron sustained when she fell on steps while exiting the building. The city building code specifically provided:

> Theatre, moving picture houses and all places where large public assemblages are frequent, shall have its entrance floor reached by gradient from the sidewalk, and no steps shall be built in any passage way leading to said entrance floor.

Kingsul Theatres, Inc., 196 S.W.2d at 318.

The court found that because Defendant, as lessee, chose to use the building as a theater rather than for some other purpose not specifically regulated by the ordinance, the lessee was subject to the obligations of that ordinance. *Kingsul Theatres, Inc.*, 196 S.W.2d at 318.

In both of the above discussed cases, the building code placed an express restriction on defendant or defendant's particular use of a building. There is no such express restriction on Defendant in this case. Plaintiffs failed to make the building code part of the record and therefore failed to show that the provisions of the code which Defendant allegedly violated expressly applied to Defendant as a lessee or occupant of a commercial building. Alternatively, Plaintiffs failed to point the Court to any authority which states that lessees or occupants of a commercial building are legally responsible *in general* for the obligations contained in the building code. Rather, it would appear to the Court that if the building code were applicable, the provisions would impose a general duty on the builder of the restaurant instead of the occupant of the premises. Since Plaintiffs failed to establish that Defendant violated a statutory duty, we find that the trial court properly dismissed Plaintiffs' negligence *per se* claim.

Finding no merit in Plaintiffs' negligence and negligence *per se* claims, the judgment of the trial court is affirmed in all respects. The costs of appeal are assessed against Appellants, Mr. and Mrs. Pittenger.

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WILLIAM B. CAIN, JUDGE